

she is located in Washington, D.C., San Francisco or a rural community.¹⁷⁰ The same is true for every competitor.¹⁷¹ Where the same competitive forces are at play nationwide, products are offered nationwide at a uniform price and the market is necessarily national.¹⁷²

Although a dwindling number of wireless customers are on rate plans that do not provide national coverage, the trend is clearly towards national rate plans. In Cingular's case, truly "local" plans are no longer offered.¹⁷³ Cingular's "Regional" plans generally offer calling scopes of at least an entire state, and usually several states, encompassing multiple MTAs and BTAs. For example, a customer in Washington, D.C. would pay a single rate for calls made anywhere in D.C., nine states, and part of West Virginia – an area ranging from the Canadian border to Hampton Roads, Virginia.

Even though these regional rate plans do not offer nationwide calling scopes, the way they are priced and sold is consistent with the national character of the market. T-Mobile, Nextel, Sprint, and Metro PCS offer the same "regional" plans nationwide, offering the same number of minutes for the same price regardless of the area in which the plan is sold.¹⁷⁴ Although the regional offerings of other carriers, including Cingular, vary somewhat by region, this variation is not indicative of the existence of a local geographic market.

First, even those carriers that do not charge a uniform nationwide price for regional service do not vary the pricing of their regional plans significantly. For example, Cingular offers a \$39.99 regional plan virtually everywhere it provides service, except in a few areas where, due to the incomplete build-out of its nationwide GSM network, it must offer dual-mode GAIT phones. Of the top 100 MSAs, the \$39.99 plan is offered in all but 4.¹⁷⁵ The number of minutes varies only slightly under this \$39.99 plan, from 600 minutes in 59 of the MSAs, to 550 minutes in 17 MSAs, and 500 minutes in 3 MSAs.¹⁷⁶ In all cases, the pricing is on a regional basis – customers in any MSA or RSA within the region receive the same price irrespective of local competitive conditions.

More importantly, the limited variation in pricing of regional calling plans is not driven by local competitive conditions. If Cingular offered more minutes on its \$39.99 plan in areas where it faced more competitors, that practice could suggest that the relevant geographic markets were local. In fact, however, there is no correlation between the number of minutes offered on regional plans and the number of competitors serving the MSA. As Professor Gilbert concludes:

The evidence supports that conclusion that price competition does not decline significantly in regions with only 1 or 2 major carriers

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See, e.g., *Grinnell Corp.*, 384 U.S. at 575 (market for central station security services was nationwide where defendants had a "national schedule of prices, rates and terms."); see also *Bell Atlantic/NYNEX*, 10 F.C.C.R. at 13375 n.28 (citing *Grinnell Corp.*).

¹⁷³ There are some customers on older local plans, but these are not sold to new customers.

¹⁷⁴ Gilbert Declaration at 37 and Tables A-1 and A-2.

¹⁷⁵ Cingular serves three of these MSAs (Tampa, FL, Birmingham, AL, and Lakeland, FL) with a \$49.99 GAIT plan and provides no regional plan in Mobile, AL.

¹⁷⁶ Gilbert Declaration at 37.

rather than 5 to 7 major carriers. My Internet price survey found that major carriers charge the same prices in 50 small RSAs as they do in the top 100 CMAs, with very few exceptions that do not appear to be related to measures of concentration. This is powerful evidence that the merger of AWS and Cingular is in the public interest and not likely to diminish competition.¹⁷⁷

This lack of correlation between local “market” structure and pricing is key. No matter how the market is defined, whether local or national, Professor Gilbert’s study demonstrates that pricing is not driven by local competitive structure. The forces of national competition, driven by vigorous competitors at the national level, plus a significant fringe of regional providers, dictate pricing throughout the country, across all cities and regions and in rural areas as well. As Professor Gilbert concludes:

The pricing of mobile wireless plans is determined by national rather than local competitive factors. This is illustrated by the fact that the prices for most mobile wireless plans do not vary according to where they are purchased. . . . My analysis of national and regional prices for calling plans and handset prices shows little to no variation that is correlated with industry structure at a local level. This supports the conclusion that the pricing of mobile wireless service is national and that the competitive effects from the proposed merger should be analyzed in a national geographic market.¹⁷⁸

The Commission took a similar approach in *EchoStar*. There, the Commission found it appropriate to apply a common analysis to different local areas that exhibited similar competitive conditions.¹⁷⁹ Likewise, there is no reason here to analyze separately different local areas because all are characterized by numerous competitors, pricing that is uniform over broad areas, and vigorous competition across many dimensions. Accordingly, the Commission should evaluate the impact of the merger on the provision of mobile service nationwide.

D. The Merger Will Not Lead to Reduced Competition in Mobile Telephony Services

1. Concentration Levels

After the merger, five strong competitors will remain offering wireless service on a nationwide basis, and these five competitors will face additional competition from strong

¹⁷⁷ Gilbert Declaration at 32. Professor Gilbert also notes that “[w]hile there is variation in the handset subsidy across CMAs, there is no apparent relationship to subscriber market shares or spectrum share at the CMA level.” *Id.* at 40.

¹⁷⁸ Gilbert Declaration at 22-23.

¹⁷⁹ *EchoStar/Hughes*, 17 F.C.C.R. at 20610. Of course, the Commission’s conclusion in that case (local markets) is distinguishable. In the mobile services market, unlike *EchoStar/Hughes*, customers are mobile and can buy wireless services away from their home, and the demand for national coverage drives national pricing.

regional and local players. This is more than sufficient to offer consumers all the benefits of a thoroughly competitive marketplace.

Concentration levels, measured by Herfindahl-Hirschman Index (HHI), provide a starting point for the analysis of competitive effects of mergers. The Commission's precedent indicates that the level of market concentration as measured by the HHI after the transaction is unlikely to give rise to anticompetitive effects.

When it adopted the CMRS spectrum cap, the Commission concluded that an HHI of 1900 would be acceptable in the market for interconnected mobile voice services.¹⁸⁰ The Commission recognized that this would be considered a highly concentrated market under the guidelines promulgated by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), but concluded that "the risk that significant competitive harm will occur is probably low in most cases."¹⁸¹

In December 2001, the Commission announced the repeal of the spectrum cap effective January 1, 2003 and reiterated its conclusion that "moderate to high concentration is not necessarily a threat to competition."¹⁸² The Commission concluded that "competition is now robust enough in CMRS markets that it is no longer appropriate to impose overbroad, *a priori* limits on spectrum aggregation that may prevent transactions that are in the public interest."¹⁸³ For the interim period between December 2001 and January 2003, the Commission observed that the new 55 MHz cap could result in four carriers holding all of the covered spectrum. The Commission also concluded that:

Raising the cap to 55 MHz increases the maximum possible input-based HHI by only 350 points, from 2,500 to 2,850. While not insignificant, this increase appears unlikely to foster unilateral pricing power in the current marketplace. [M]obile telephony operators typically experience high fixed costs and low marginal costs of production. Low marginal costs mean that producers can potentially achieve high profits by reducing their prices, and therefore can render tacit agreements to charge high prices difficult to sustain.¹⁸⁴

Thus, the Commission has determined that concentration levels between 1900 and 2850 are acceptable given the competitive state of the industry.¹⁸⁵ This transaction would thus

¹⁸⁰ *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, Report and Order*, 11 F.C.C.R. 7824, 7873 (1996) ("Spectrum Cap Order").

¹⁸¹ *Id.* at 7872.

¹⁸² *See 2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22668 (the effective date for spectrum cap elimination was January 1, 2003).

¹⁸³ *Id.* at 22694.

¹⁸⁴ *Id.* at 22703.

¹⁸⁵ *See id.*; *Spectrum Cap Order*, 11 F.C.C.R. at 7873.

produce an HHI well below the range where the Commission has concluded that anticompetitive effects are likely.

Professor Gilbert has calculated market shares and HHIs on a number of different bases. Market shares are typically calculated based upon each competitor's revenue.¹⁸⁶ Using a conservative approach to HHI calculation (one that treats all regional competitors as if they were a single firm), the transaction would result in a post-merger HHI of 2023, well below the range in which the Commission has concluded that anticompetitive effects are likely.

HHIs Based on National Revenue Share ¹⁸⁷			
Carrier	Revenue Share		Post-Merger
	2002	2003	
Verizon Wireless	20.1%	21.0%	21.0%
Cingular Wireless	15.3%	14.4%	30.0%
AT&T Wireless	16.3%	15.6%	
Sprint PCS	12.6%	11.8%	11.8%
T-Mobile	5.2%	7.5%	7.5%
Nextel	9.1%	10.1%	10.1%
Regional Carriers	21.4%	19.6%	19.6%
Total	100.0%	100.0%	100.0%
Revenue HHI	1,630	1,573	2,023
Revenue HHI Change		(57)	450

Calculating shares based upon revenue can be misleading in a vibrant industry such as this one, however, because revenue shares reflect in large measure the firm's *past* success in winning customers, rather than its current and future competitive significance. As Professor Gilbert notes, "flow share [also called share of gross adds] is in many respects a better indication of competition in the market for mobile than total revenue share because it measures how consumers are currently choosing between the different providers of wireless services."¹⁸⁸

Using the flow share measure, Cingular and AWS would have a combined share of only 16.3%. The current HHI would be 2,081 and would increase by a mere 128 points to 2,210.

¹⁸⁶ "[T]he principal judicial device for measuring actual or potential market power remains market share, typically measured in terms of a percentage of total market sales." *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 994 (11th Cir. 1993); cf. *U.S. v. SBC Communications, Inc.*, 1999 WL 1211458, at *15 (D.D.C. Aug. 2, 1999) (noting that "[t]he United States has used subscriber data here to estimate market shares because those data are more readily available. In some contexts, however, other measures of market share may provide a more precise indication of market concentration or a firm's competitive significance.")

¹⁸⁷ See Gilbert Declaration at 25, Table 3.

¹⁸⁸ Gilbert Declaration at 25.

This HHI is again well below the level at which the Commission believes anticompetitive effects are likely.

HHI Based on National Revenue Flow Share¹⁸⁹

Carrier	Flow Share 2003	Post- Merger
Verizon Wireless	28.8%	28.8%
Cingular Wireless	6.8%	16.3%
AT&T Wireless	9.5%	
Sprint PCS	5.5%	5.5%
T-Mobile	26.8%	26.8%
Nextel	18.7%	18.7%
Regional Carriers	3.9%	3.9%
Total	100.0%	100.0%
Flow Revenue HHI	2,081	2,210
Flow Revenue HHI Change		128

Market concentration is, however, “only the starting point for analyzing the competitive impact of a merger.”¹⁹⁰ The Commission must thus consider “whether the merger will increase the likelihood of unilateral anticompetitive conduct by the merged entity or coordinated anticompetitive conduct of multiple market participants.”¹⁹¹ A thorough analysis demonstrates that neither unilateral anticompetitive conduct nor coordinated effects are likely after the merger.

2. Unilateral Effects

The merger of two companies will create unilateral effects only when a combined company can raise prices without triggering the ability of competitors to alter their prices.¹⁹² Unilateral effects are unlikely where there are other firms with similar cost characteristics that sell products that consumers regard as close substitutes for the products sold by the merging firms.¹⁹³

Professor Gilbert notes that although there is some product differentiation in the mobile wireless service industry as a result of differences in call quality, dropped and blocked calls, geographic coverage, and administrative service, the fact that prices for mobile wireless service plans are very similar across the major national wireless service providers suggests that product

¹⁸⁹ *Id.* at 26, Table 4.

¹⁹⁰ United States Department of Justice/Federal Trade Commission, Horizontal Merger Guidelines, Apr. 1992, at ¶ 2.0 available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html (“Merger Guidelines”).

¹⁹¹ E.g., *In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 F.C.C.R. 18025, 18047 (1998).

¹⁹² See Gilbert Declaration at 28.

¹⁹³ *Id.*

differentiation is not a primary determinant of competition in this industry.¹⁹⁴ To the extent that there is differentiation along these quality axes, “the merger would not significantly alter the choices available to mobile wireless consumers.”¹⁹⁵

Anticompetitive unilateral effects are also unlikely given the merging firms’ low combined share. The DOJ/FTC Merger Guidelines recognize that unilateral effects are unlikely in markets (like the market for wireless services) where the post-merger market share of the merged firm is less than 35 percent.¹⁹⁶ Here, however, the merger will result in a combined market share of AWS and Cingular of only 16.3% based on the more accurate national flow share measure. (Looking at national revenue share would still leave the combined share, 30%, below the Merger Guidelines threshold.)

Moreover, the prospect of new entrants and competition from other sources also undermines the likelihood of unilateral effects. In addition to resellers, regional and smaller CMRS carriers, and the four remaining nationwide CMRS providers, the combined company will face competition from satellite providers of interconnected mobile voice services (including at least four 2 GHz MSS providers), Virtual Network Operators (such as Virgin Mobile), and wireless Voice over Internet Protocol (“VoIP”) offerings.¹⁹⁷ These services will exert competitive pressure on the combined company and eliminate the potential for unilateral effects.

¹⁹⁴ *Id.* at 29.

¹⁹⁵ *Id.*

¹⁹⁶ “Where the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.” *Merger Guidelines*, *supra* note 190 at § 2.22.

¹⁹⁷ The Commission has recognized that Wi-Fi “has the potential to act as both a substitute and a complement to data services offered over mobile telephone networks.” *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14862. More and more companies are announcing the availability of products that support the transmission of wireless VoIP. For example, Nokia and Cisco announced that Nokia’s 9500 Communicator handsets will be able to use Cisco’s wireless LAN infrastructure, so that mobile phones equipped with Wi-Fi chips and the appropriate software can use a Wi-Fi access point to make phone calls via the Internet, using VoIP capabilities. By making use of unlicensed spectrum for Wi-Fi and an Internet Protocol backbone, “Nokia’s Communicator 9500 will be able to bypass conventional mobile-phone networks ...” David Pringle, *Nokia Takes Leap Into Wi-Fi Arena with New Phone*, WALL ST. J., Feb. 23, 2004 at B4.

Nokia is not the only company producing such handsets. Motorola is developing handsets with built-in Wi-Fi capabilities. Toshiba has bundled its e800/805 Series Pocket PC handhelds with Gphone wireless VoIP software, allowing Toshiba users to use wireless LANs to make VoIP calls. *Toshiba bundles VLI Gphone wireless VoIP software with PDAs*, FEDERAL COMPUTER MARKET REPORT, Nov. 10, 2003; Peter Bell, *SIP goes mobile: when IP goes wireless, SIP will be at its heart*, TELECOMMUNICATIONS AMERICAS, Mar. 1, 2003 (“Several companies have already launched products that bring VoIP and other IP-based features, such as conferencing and call forwarding to W-LAN-enabled laptop and PDA users.”). Additionally,

(continued)

Unilateral effects in the context of mobile voice services also are unlikely because of the ease of potential entry.¹⁹⁸ The FCC has announced that the availability of additional spectrum for interconnected mobile voice and 3G services. In 2002, the Commission allocated 90 MHz of spectrum for the provision of 3G and other mobile services.¹⁹⁹ The Commission has also sought comment on the possible uses of an additional 30 MHz reallocated from MSS, including for 3G services, and Verizon Wireless has recently advocated that a portion of this spectrum in the 1.9 GHz band be licensed through auction.²⁰⁰ Additional spectrum, such as the upper 700 MHz band, likely will be available for mobile voice services in the near future.

Given these facts, any concerns regarding unilateral effects are implausible.

(footnote continued)

several major chipmakers, including Texas Instruments, Broadcom, Royal Phillips Electronics and Atheros Communications, are making Wi-Fi chips small enough to fit into cellphones. Ben Charny, *TI debuts Wi-Fi chip for phones, PDAs*, CNET NEWS.COM, Sept. 16, 2003 at <http://news.com.com/2100-73513-5077695.html>.

In addition to the increase in the technology available to provide wireless VoIP, there has been a marked increase in the number of hot-spots for wireless LAN access. Gartner, Inc., a research and advisory firm, stated that wireless LAN hot-spots have risen from 1,200 in 2001 to over 71,000 in 2003. *Analysts Project More Than 71,000 Public Wireless LAN Hot Spots in 2003*, GARTNER.COM, June 30, 2003, available at http://www3.gartner.com/5_about/press_releases/pr30june2003a.jsp. Additionally, hot-spot locations are continuing to increase. See, e.g., Richard Shim, *McDonald's Wi-Fi Recipe Could Define Industry*, CNET NEWS.COM, March 12, 2004, at http://news.com.com/2100-7351_3-5172630.html (McDonald's, Barnes & Noble and Starbucks installing Wi-Fi hot spots). The increase in hot-spot locations coupled with the increase in the technology capable of completing Wi-Fi/VoIP calls translates to greater demand and use of wireless VoIP. The FCC must consider wireless VoIP accomplished via wireless LANs as a real and viable competitor to traditional mobile telephony. See Brad Smith, *Nokia, IBM Talk Enterprise Strategy*, WIRELESS WEEK, Feb. 23, 2004 (discussing the new Nokia 9500 Handset), available at <http://www.wirelessweek.com/index.asp?layout=newsat2direct&Pubdate=02%2F23%2F04>.

¹⁹⁸ In markets where Cingular holds an attributable interest in more than 80 MHz throughout a BTA, it will reduce its holdings to no more than 80 MHz. Thus, access to additional spectrum will be available in each of these markets.

¹⁹⁹ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, Second Report and Order*, 17 F.C.C.R. 23193 (2002) ("AWS Allocation Order"), recon. pending.

²⁰⁰ See *Allocation of Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order*, 18 F.C.C.R. 2223 (2003); Letter to Marlene H. Dortch, Secretary, FCC from John T. Scott, III, Verizon Wireless in WT Docket No. 02-55, (Feb. 26, 2004) at 3.

3. Coordinated Effects

The transaction also will not increase the likelihood of anticompetitive coordination among wireless carriers. In the first place, the characteristics and behavior of this industry belie any potential for collusion. The post-merger industry structure, with five robust national competitors and significant competitive pressure from regional and local players, is not compatible with coordinated behavior.

In addition, as Professor Gilbert discusses, a coordinated effort to raise prices could be successful, in theory, only if each of the following conditions is satisfied:

- The costs of restraining output or elevating price are comparable to the benefits for all of the coordinating firms;
- Non-coordinating firms (sometimes called “mavericks”) face limits on their ability to expand capacity;
- Firms are able to monitor the coordination in price or output by other firms;
- The coordinating firms can punish firms that fail to coordinate their price or output; and
- Firms do not have opportunities for product or other service innovations that would allow them to achieve discrete competitive advantages while escaping punishment by other firms.²⁰¹

Professor Gilbert’s declaration enumerates the reasons why “[c]oordinated effects are unlikely in the market for mobile wireless services.”²⁰²

- “After the merger, there would be at least 5 major national carriers and more than a dozen regional players serving numerous areas across the country.”²⁰³
- “Newer entrants such as T-Mobile and regional competitors such as MetroPCS are eager to take business from the more established firms and have the capacity to do so. It is unlikely that relationships among the wireless suppliers will become less complex and varied after the merger.”²⁰⁴
- “The industry has a history of price and quality competition and rapid innovation. Prices have declined rapidly, particularly after the licensing of new PCS spectrum in 1995. Wireless companies provided new services

²⁰¹ Gilbert Declaration at 27.

²⁰² *Id.*

²⁰³ *Id.* at 28.

²⁰⁴ *Id.*

such as voicemail, caller ID, SMS, and mobile Internet offerings, and developed innovative pricing plans.”²⁰⁵

- “The history of price declines and the large mix of services and price offerings is inconsistent with a stable relationship required to maintain collusive outcomes.”²⁰⁶
- “Wireless providers compete in different dimensions, including equipment subsidies as well as monthly price, number of free minutes and how they break down by off-peak and on-peak, roaming charges, and other services, such as on-net free calling. Wireless providers also differ in the quality of service and the amount of excess capacity. The latter, in particular, creates different incentives for price-cutting by different firms in the industry.”²⁰⁷

There is thus no basis for concern that the transaction will facilitate anticompetitive coordinated effects.

E. The Merger Will Have No Impact on Bundled Services

In past merger decisions, the Commission has examined the potential impacts of mergers in possible markets for bundles of telecommunications services. This transaction will not have any adverse impact on the bundling of wireless services with other telecommunications services.

The Department of Justice has recognized that “efficient, voluntary bundling through discounts or otherwise . . . benefits customers by offering them the improved products, lower prices and lower transaction costs they desire.”²⁰⁸ Such bundles generally involve a package of complementary goods, often at a discount from the prices of the items if purchased separately.²⁰⁹ These combinations can be created simply for consumer convenience (*i.e.*, “one stop shopping”), or can offer prices lower than the sum of the *a la carte* prices.

SBC and BellSouth are sales agents for Cingular and sell Cingular service on either a stand-alone basis or at the same time the customer is purchasing wireline services. Numerous other providers offer various packages of telecommunication services, many of which include

²⁰⁵ *Id.* at 27-28 (footnote omitted).

²⁰⁶ *Id.* at 28.

²⁰⁷ *Id.*

²⁰⁸ See United States Department of Justice, *Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers – Range Effects: The United States Perspective*, Oct. 2001, at 3 available at <http://www.usdoj.gov/atr/public/international/9550.pdf>.

²⁰⁹ *Id.* at 15, n.41. The FCC has addressed bundling in a telecommunications context, and found that “the benefits of bundling come from allowing consumers to purchase an all-inclusive bundle at a single price that consists of interstate, domestic, interexchange transmission services combined with their choice of enhanced service and CPE.” *Policy and Rules Concerning the Interstate, Interexchange Marketplace; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment And Enhanced Services Unbundling Rules, Report and Order*, 16 F.C.C.R. 7418, 7433 (2001).

wireless service as well. Qwest today offers packages with a monthly discount on selected Qwest Choice™ Wireless calling plans when combined with other Qwest services – including wireline service – on one bill.²¹⁰ MCI offered packages that included both wireless and wireline service prior to bankruptcy.²¹¹ And Sprint, which has been promoting its “Complete Sense unlimited” wireless/wireline bundles since August 2003,²¹² recently announced that it would combine its wireless and wireline tracking stocks in part to continue the offering of “a full suite of integrated products and services.”²¹³

AT&T Corp., which divested AWS and now has no wireless affiliate, recently announced that it intends to offer bundles that include wireless service, combining the AT&T brand (which AWS cannot use six months after being acquired by Cingular) with wholesale service provided by another wireless carrier. As its Chairman and CEO David Dorman told Wall Street analysts on February 25, 2004 under the heading “Wireless Re-entry:”

The fact remains that, while AT&T Wireless and their network goes to Cingular, there will be six large wireless providers in the U.S. ... [I]t's an abundance, and ... we like the idea of being able to go to the marketplace and say, hey, if we buy billions of minutes what can we buy them for?”²¹⁴

Moreover, there are numerous other types of combinations of telecommunications and related services, such as those offered by cable companies that include video and broadband.²¹⁵ One example is the Wi-Fi agreement between Comcast and T-Mobile entered into last month pursuant to which T-Mobile will offer its Wi-Fi services at a discount to Comcast customers.²¹⁶ Time Warner also has indicated it is considering adding wireless to its bundles.²¹⁷

²¹⁰ See Press Release, Qwest Communications, *Qwest Communications Introduces Nationwide Wireless Calling*, Mar. 1, 2004, at www.qwest.com/about/media/pressroom/1%2C1720%2C1457_current%2C00.html (March 1, 2004).

²¹¹ See *Sprint Unveils Bundled Phone Services*, TECHWEB NEWS, Aug. 27, 2003 at <http://www.techweb.com/wire/story/TWB20030827S0009>.

²¹² *Id.*

²¹³ News Release, Sprint Corporation, *Sprint to Recombine Tracking Stocks and Return to Single Common Stock*, Feb. 29, 2004, at http://www3.sprint.com/PR/CDA/PR_CDA_Press_Releases_Detail/0,3681,1111970,00.html.

²¹⁴ AT&T Analyst Meeting, Feb. 25, 2004, available at http://www.att.com/ir/redirect/2004_analyst_webcast.html.

²¹⁵ See, e.g., Press Release, Qwest Communications, *Qwest Communications Introduces Nationwide Wireless Calling New Plans Offer Customers Greater Flexibility and Choice with Wireless Calling Across the United States*, Mar. 1, 2004, at http://www.qwest.com/about/media/pressroom/%2C1720%2C1457_current%2C00.html.

²¹⁶ See Press Release, T-Mobile USA, *T-Mobile and Comcast Announce Strategic Marketing Alliance*, Feb. 02, 2004, at <http://www.t-mobile.com/company/pressroom/pressrelease87.asp>.

²¹⁷ See *Time Warner Cable CEO: Wireless should be in bundle*, SAN JOSE MERCURY NEWS, Mar. 10, 2004, available at www.siliconvalley.com/mld/siliconvalley/8154346.htm?template=contentModules/printstory.jsp.

In light of these facts, this transaction will not have any adverse effect on the offering of competitive telecommunications bundles. The transaction will create no barriers to the offering of existing and new service bundles by all types of providers.

F. The Merger Will Not Harm Intermodal Competition

The FCC has consistently viewed wireless and wireline services as different product markets, although it has recently recognized a greater degree of intermodal competition.²¹⁸ Indeed, the intense competition and rapid growth in wireless voice services has led to a degree of substitution of *wireless minutes* for *wireline minutes*. This transaction will not retard the trend towards convergence between wireless and wireline communications.

Cingular's parents are major wireline carriers. Yet, Cingular has competed vigorously for wireless business (including being the first company to market features such as rollover minutes) throughout its service territory, which overlaps almost completely with the ILEC territories of its parents. The merger with AWS will add only insubstantially to Cingular's presence within SBC and BellSouth's wireline territories. Thus, there is no reason to believe that the merger will reduce the degree of intermodal competition faced by SBC and BellSouth. Wireline customers seeking to switch to an all wireless service still will have Cingular and four other carriers to choose from at a national level, in addition to numerous smaller carriers. These carriers will compete vigorously with Cingular for each such consumer. Indeed, as Professor Gilbert observes, the merger is unlikely to change this competitive environment:

Because mobile wireless competition is national in scope, the merged company is unlikely to raise wireless prices only in its' parents' wireline service territories. If it attempted to do so, given the competitive wireless market, it could not stop or slow wireline to wireless substitution. It would simply lose share, as other wireless carriers would be eager to take the business. Given that the combined company would lack the ability to control such a dynamic, it would have no incentive not to aggressively compete to win such customers.²¹⁹

IV. REQUEST FOR WAIVER OF THE CELLULAR RSA CROSS INTEREST RULE

As a result of the proposed merger, Cingular will be acquiring cellular A Band spectrum from AWS in eleven RSAs where Cingular presently holds spectrum on the cellular B Band, as identified below and discussed in Section IV.C.1 (the "overlap area(s)"). Section 22.942 of the Commission's rules, also known as the cellular cross-interest rule, generally limits the ability of a party to have interests in cellular licenses on different channel blocks in the same RSA. The Commission, however, has provided that waivers will be considered where doing so would not

²¹⁸ See, e.g., *Telephone Number Portability*, CC Docket No. 95-116, *Order*, FCC 04-12 (rel. Jan. 16, 2004).

²¹⁹ See Gilbert Declaration at 32.

create a significant likelihood of substantial competitive harm in the relevant area and would otherwise serve the public interest. As shown below, these grounds are satisfied here.²²⁰

The AWS calls signs for which a waiver of Section 22.942 is requested are as follows:²²¹

RSA	RSA Name	AT&T Call Sign	AT&T Licensee
CMA357	Connecticut 1 - Litchfield	KNKN833	Litchfield Acquisition Corporation
CMA360	Florida 1 – Collier	KNKN555	AT&T Wireless Services of Florida, Inc.
CMA361	Florida 2 – Glades	KNKQ386 KNKQ421	AT&T Wireless Services of Florida, Inc.
CMA363	Florida 4 – Citrus	KNKN738	AT&T Wireless Services of Florida, Inc.
CMA364	Florida 5 – Putnam	KNKN550 KNKQ422	AT&T Wireless PCS, LLC AT&T Wireless Services of Florida, Inc.
CMA598	Oklahoma 3 – Grant	KNKN627	OK-3 Cellular, Inc.
CMA657	Texas 6 – Jack	KNKN472	McCaw Communications of Gainesville, TX, LLC
CMA662	Texas 11 – Cherokee	KNKN428	Northeast Texas Cellular Telephone Company
CMA669	Texas 18 – Edwards	KNKN456	Texas Cellular Telephone Company, L.P.
CMA670	Texas 19 – Atascosa	KNKN525	Texas Cellular Telephone Company, L.P.
CMA671	Texas 20 – Wilson	KNKN452	Texas Cellular Telephone Company, L.P.

A. Background

Section 22.942 states, in pertinent part:

A licensee, an individual or entity that owns a controlling or otherwise attributable interest in a licensee, or an individual or entity that actually controls a licensee for one channel block in a CGSA may not have a direct or indirect ownership interest of more than 5 percent in the licensee, an individual or entity that owns a

²²⁰ Cingular is seeking all relief necessary from DOJ to hold the spectrum and licenses that are the subject of this transaction.

²²¹ On March 12, 2004, AWACS, Inc. (“AWACS”), a wholly owned, indirect subsidiary of SBC Communications Inc., entered into a contract with Celco Partnership d/b/a Verizon Wireless and another party. Under that contract, subject to various conditions (including the receipt of any required regulatory consents), AWACS is to acquire Verizon Wireless’s 50 percent, non-managing interest in Bristol Bay Cellular Partnership (“Bristol Bay”). Bristol Bay holds KNKQ331, a Phase 2 B-Band cellular license for Alaska RSA 2. AWS holds a 49 percent, noncontrolling interest in Cordova Wireless, which holds WPOL372, a Phase 2 A-Band cellular license for Alaska RSA 2. Cingular plans to acquire that interest along with the rest of AWS. Despite involving both cellular bands in the same RSA, those acquisitions would not violate the cellular cross-ownership rule when both deals are consummated because the cellular geographic service areas (“CGSAs”) for the two licenses do not overlap. *See* 47 C.F.R. § 22.942(a).

controlling or otherwise attributable interest in a licensee, or an individual or entity that actually controls a licensee for the other channel block in an overlapping CGSA, if the overlap is located in whole or in part in a Rural Service Area (RSA).²²²

Absent a waiver, the rule provides for divestiture of spectrum that causes a conflict with the rule's provisions prior to the consummation of a transaction which would otherwise create the conflict.²²³

The cellular cross-interest rule was adopted in 1991 when cellular licensees were the predominant providers of mobile voice services and originally applied to both MSAs and RSAs.²²⁴ In adopting the cross-interest rule, the Commission stated that "in a service where only two cellular carriers are licensed per market, the licensee on one frequency block in a market should not own an interest in the other frequency block in the same market."²²⁵ Therefore, "[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems," the Commission restricted a party's ability to hold ownership interests in both cellular licensees in the same area.²²⁶

In 1999, the Commission reexamined the need for the rule as a part of its Biennial Review process. It found that the market shares for cellular carriers had eroded with the emergence of competition from PCS and digital SMR, but that the two cellular carriers still had the majority of subscribers and were the only providers in many markets.²²⁷ It did, however, find that the increased competition warranted relaxation of attribution benchmarks used in the rule.²²⁸

By the next Biennial Review in 2001, the Commission found that competitive conditions had changed and cellular carriers no longer possessed market power in MSAs. It specifically found that 86% of MSA counties had 4 or more CMRS competitors.²²⁹ As a result, it concluded that in MSAs "the cellular duopoly conditions that prompted the rule's adoption no longer

²²² 47 C.F.R. § 22.942(a).

²²³ See 47 C.F.R. § 22.942(c). The rule states that parties needing to divest "will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the conflicting interest . . . or other request for Commission approval by which, if granted, such parties no longer would have an attributable interest in the conflicting interest." 47 C.F.R. § 22.942(c)(1).

²²⁴ *Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, 6 F.C.C.R. 6185, 6628-29 (1991) ("Cellular First Report and Order"). The rule initially was codified at 47 C.F.R. § 22.902(b)(5) but subsequently was moved to 47 C.F.R. § 22.942. *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, 9 F.C.C.R. 6513, 6574 (1994).

²²⁵ *Cellular First Report and Order*, 6 F.C.C.R. at 6628.

²²⁶ *Id.*

²²⁷ *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Report and Order*, 15 F.C.C.R. 9219, 9251-52 (1999).

²²⁸ *Id.* at 9252-53.

²²⁹ *2000 Biennial Regulatory Review*, 16 F.C.C.R. 22668, 22707-08 (2001).

exist.”²³⁰ Given “the presence of numerous competitive choices for consumers in such markets,” the Commission “repeal[ed] the rule in MSAs in order to provide relief from capacity constraints.”²³¹ The Commission also found that competition warranted allowing the separate cap on the aggregation of CMRS spectrum to sunset.²³² The cellular cross-interest rule was retained in RSAs, however, because at that time only 24% of RSA counties had 4 or more competitors and there was little competition from PCS providers in rural areas.²³³

Most recently, in October 2003, the Commission sought comment on whether the rule was a barrier to investment and should be eliminated in favor of case-by-case review, or whether market conditions warranted its continued retention.²³⁴ The Commission tentatively concluded that the rule should be eliminated in RSAs with 4 or more CMRS competitors.²³⁵ The majority of commenters supported elimination of the rule in its entirety.²³⁶

B. Waiver Standard

In general, Commission rules may be waived upon a showing that there is “good cause” to do so.²³⁷ Waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than would strict adherence to the general rule.²³⁸ Circumstances that would justify a waiver include “considerations of hardship, equity, or more effective implementation of overall policy.”²³⁹ Waiver is also appropriate if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.²⁴⁰ The courts require that the Commission give a “hard look”

²³⁰ See *id.* at 22671, 22707-08.

²³¹ *Id.* at 22707.

²³² *Id.* at 22670-71.

²³³ See *id.* at 22684, 22708-09.

²³⁴ *Facilitating the Provision of Spectrum-Based Services to Rural Areas, Notice of Proposed Rulemaking*, 18 F.C.C.R. 20802, 20884-85, 20849 (2003) (“*Rural NPRM*”).

²³⁵ See *id.* at 20847.

²³⁶ See Comments of AT&T Wireless, Cingular, CTIA, Dobson and OPASTCO/RTG in WT Docket No. 02-381 (filed Dec. 29, 2003); Reply Comments of Western Wireless in WT Docket No. 02-381, Reply Comments of Arctic Slope Tel. Assoc. Coop. in WT Docket No. 02-381 (filed Jan. 26, 2004); compare Comments of RCA in WT Docket No. 02-381 (filed Dec. 29, 2003) (apply rule only in RSAs with three or fewer competitors). But see Comments of U.S. Cellular in WT Docket No. 02-381 (filed Dec. 29, 2003) (opposing the rule’s elimination by favoring increased attribution thresholds).

²³⁷ See 47 C.F.R. § 1.3; see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“*WAIT Radio*”); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

²³⁸ *Northeast Cellular*, 897 F.2d at 1166.

²³⁹ *WAIT Radio*, 418 F.2d at 1159.

²⁴⁰ See *id.* at 1157.

at waiver requests to ensure that applying a rule in a particular case would serve the public interest.²⁴¹

In its 2001 decision to retain the cellular cross-interest rule in RSAs, the Commission provided for a specific waiver standard. That standard is as follows: “[t]o the extent that it can be shown that an RSA exhibits market conditions under which a specific cellular cross-interest would not create a *significant* likelihood of *substantial* competitive harm, such a situation can be addressed through waiver of the cross-interest prohibition.”²⁴²

In January 2003, the Wireless Telecommunications Bureau (“Bureau”) applied this specific waiver standard for the first time.²⁴³ In determining whether cellular cross-interests may be permissible “without significant likelihood of substantial competitive harm,” and therefore whether a waiver is in the public interest, the Bureau considered “the competitive effects of the transaction.”²⁴⁴ It first considered the relevant product market, and found it to be interconnected mobile voice services.²⁴⁵ It next considered the relevant geographic market. Noting that no party argued for a geographic market narrower than the BTA in which the RSA overlap occurred, the Bureau agreed that the market was “broader” than just the RSA overlap area.²⁴⁶ It chose an area of similar size, though not entirely coterminous with, the larger BTA as representative of the area in which customers face similar choices in terms of competitors, pricing and service options.²⁴⁷

Within the relevant market, the Bureau examined a number of factors to assess whether there was a significant likelihood of substantial competitive harm, including: (i) the number of competitors remaining in the relevant market; (ii) the ability of the acquiring party to increase prices or reduce service quality in the overlap area, and (iii) the size of the overlap in comparison to the relevant market.²⁴⁸ In making these assessments, the Commission noted that the presence of multiple other competitors in the relevant market, the small size of the overlap, and relative pricing parity among the competitors, acted to constrain the entity acquiring the overlapping cellular interests from having the ability or incentive to charge discriminatory prices.²⁴⁹

²⁴¹ See *id.* For cellular and other wireless providers, Section 1.925 of the Commission’s rules, 47 C.F.R. § 1.925, codifies these general principles.

²⁴² 2000 Biennial Regulatory Review, 16 F.C.C.R. at 22709 (emphasis added).

²⁴³ *CenturyTel Wireless, Inc. and CenturyTel, Inc.; Request for a Waiver of Cellular Cross-Interest Rule, Section 22.942 of the Commission’s Rules, Memorandum Opinion and Order*, 18 F.C.C.R. 1260 (WTB 2003) (“*CenturyTel*”).

²⁴⁴ *Id.* at 1263.

²⁴⁵ *Id.*

²⁴⁶ See *id.* at 1263-64.

²⁴⁷ Specifically, the Bureau selected an undefined area it termed the “Broader Baton Rouge Area.” That area encompassed 5 of the 9 parishes of the Baton Rouge BTA plus 2 additional parishes outside, but adjacent to, the BTA. See *id.*

²⁴⁸ See *id.* at 1264-66.

²⁴⁹ See *id.* at 1265-66. In *CenturyTel*, the number of competitors did not change. ALLTEL held an indirect 100% interest in the A Band licensee and a non-controlling partnership interest in the B Band carrier. The controlling partner in the B Band licensee was Cingular. Thus, the

(continued)

As demonstrated below, application of these factors to the cellular cross-interests at issue here would not create a “significant likelihood of substantial competitive harm.” Therefore, under the circumstances presented here, waiver of Section 22.942 is in the public interest.²⁵⁰

C. The Standard for Waiving the Cellular Cross-Interest Rule Is Satisfied in the Circumstances Presented Here

1. The Cellular Cross-Interests Do Not Create a Significant Likelihood of Substantial Competitive Harm

Consistent with the *CenturyTel* decision, the relevant product market for evaluating this waiver request is mobile telephony.²⁵¹ The relevant geographic market is nationwide or, for purposes of evaluating this waiver, the community of interest – defined as the BTA(s) in which the applicable overlap area is located. Irrespective of which geographic market is used, the result is the same. The market is fully competitive with at least 4 other authorized competitors and no ability to unilaterally set pricing.²⁵² As discussed in more detail below, even in a smaller area limited to the discrete RSA overlap counties only – which the Bureau in *CenturyTel* properly recognized as being too small to be the relevant market – there are at least 4 authorized competitors. Under these circumstances, there is no likelihood that the cellular cross-interests will create a significant likelihood of competitive harm.

a. Competition in the Nationwide Market Is Robust and Justifies a Waiver

As previously discussed, the relevant geographic market is nationwide – the market in which national, regional and local carriers compete today.²⁵³ This is due largely to the fact that nationwide price plans establish pricing trends not only at the national level but also at the

(footnote continued)

two blocks remained controlled by different competitors. The greater concern in *CenturyTel* was whether the two parties could collude or ALLTEL would be inclined to compete less aggressively because it earns a share of Cingular’s profits as a limited partner in the partnership. The Bureau found this was not a concern given the small size of the overlap area, the presence of 4 other competitors, and the existence of pricing parity among the competitors. *See id.* at 1266.

²⁵⁰ *See id.* at 1266.

²⁵¹ *See id.* at 1263.

²⁵² The Commission should properly consider both licensed new entrants and licensed operational carriers in assessing competition in the relevant market. *See Establishment of Rules and Policies for LMDS, Third Report and Order and Memorandum Opinion and Order*, 15 F.C.C.R. 11857, 11860-61 (2000) (determination of whether there is a “significant likelihood of substantial competitive harm” entails examining a number of factors, including “entry barriers[] and potential competition”), *cited in 2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22709 n.257. The barrier to entry has been lowered now that the FCC has permitted spectrum leasing and is supportive of infrastructure sharing. Both existing competition and the threat of ease of entry of potential competition impose discipline on the marketplace.

²⁵³ *See supra* Section III.C.

regional and local levels.²⁵⁴ Regional and local carriers are subject to the same competitive pressures of nationwide carriers due to national advertising and the Internet, which have served to educate consumers about pricing and service offerings on a national scale.²⁵⁵ Because wireless providers do not price plans differently across regions, Professor Gilbert has concluded that “the geographic scope of competition in the provision of mobile wireless calling plans should be analyzed as national.”²⁵⁶

Using a nationwide relevant market, there is no question that the retention of overlapping cellular cross-interests in select counties nationwide simply cannot cause significant competitive harm in the national market. The overlaps occur in parts of eleven cellular RSAs, each of which is comprised of between 1-12 counties spread out over five states.²⁵⁷ The total number of counties at issue with cellular RSA overlaps is 53, which represents barely 1.7% of the 3141 counties or county equivalents nationwide. These counties include as little as 414 POPs (Kenedy County, TX) to as much as 210,528 POPs (Lake County, FL) for a total of 1,795,833 POPs across all 53 counties, which equates to barely more than 0.6% of the 281,421,906 POPs nationwide.²⁵⁸

In a national market comprised of a minimum of 5 nationwide mobile telephone operators, as well as MSS providers, resellers, and a number of large regional players,²⁵⁹ Cingular’s acquisition of overlapping cellular interests in these discrete areas does not give it either the ability or the incentive to charge discriminatory prices nationwide. Cingular does not even offer service plans limited to each of these discrete overlap areas; its smallest rate plan covers at least an entire state, and in most cases multiple states.²⁶⁰ Because pricing trends are established at the national level, Cingular cannot leverage these limited overages of the RSA cross-interest rule to affect pricing nationwide.²⁶¹

²⁵⁴ See *id.*

²⁵⁵ See *id.*; *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14792 n.45 (citing Dobson Comments).

²⁵⁶ Gilbert Declaration at 19.

²⁵⁷ The specific RSAs and counties within those RSAs where the overlaps occur is set forth in Section IV.C.1 below.

²⁵⁸ This estimate is based upon actual population in the counties with overlap areas. Comparing only POPs in the overlap counties that are actually served to overall POPs nationwide may result in an even lower percentage. This also applies to all BTA/overlap area size comparisons below, which are based upon population. All population figures are based on the 2000 Census.

²⁵⁹ See *supra* Section IV.C.

²⁶⁰ Lefar Declaration at 7.

²⁶¹ See Gilbert Declaration at 23-33.

b. Even at the BTA Level, Significant Competition Precludes the Possibility of Substantial Competitive Harm and Justifies a Waiver

Even assuming *arguendo* that the relevant market for evaluating the waiver is not nationwide, there still is no risk of competitive harm in an area such as that utilized in the *CenturyTel* decision. As noted above, in *CenturyTel* the Bureau chose an area in which customers faced “similar” market conditions with respect to price and service options. That area approximated, though was not entirely coterminous with, the BTA. The Commission in the past has explained that BTAs comprise areas “within which consumers have a community of interest.”²⁶² BTAs are therefore an appropriate, and ascertainable, area within which to assess whether the cellular cross-interests would create a significant likelihood of substantial competitive harm.²⁶³

As depicted in Attachment 9 and discussed in more detail below, the BTAs within which the RSA cellular overlaps occur are intensely competitive, with at least 4 other licensed competitors and more than 6 licensed competitors in many BTAs. Indeed, even in a smaller area limited to the RSA overlap counties only (which, as noted below, the Commission has previously indicated do not comport to natural service areas and are too small to be a relevant market for purposes of evaluating the waiver request), there are at least 4 licensed competitors in 51 of the 53 counties, and at least 3 licensed competitors in the remaining 2 counties. These 2 counties are part of a multi-county overlap area in which there are at least 4 competitors in some part of the overlap.²⁶⁴ This level of competition meets or exceeds the level of competition that justified elimination of the cellular cross-interest rule in MSAs – the presence of 4 or more competitors in most (but not all) MSA counties, which demonstrated that “cellular carriers no longer possessed market power” in these service areas.²⁶⁵ In fact, the Commission recently proposed to eliminate the rule in RSAs having 4 or more competitors, tentatively concluding that this level of competition would protect against potential competitive harms.²⁶⁶

²⁶² See *Establishment of Rules and Policies for Local Multipoint Distribution Service, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration*, 8 F.C.C.R. 557, 562 (1993).

²⁶³ The specific “Broader Baton Rouge Area” chosen in *CenturyTel* does not comport with FCC mobile voice service license areas (e.g., cellular MSAs or RSAs or PCS MTAs or BTAs), making it of little utility outside of the specific area in question. BTAs best comport with the Bureau decision’s to examine competition in a community with “similar market conditions.” See *CenturyTel*, 18 F.C.C.R. at 1265.

²⁶⁴ Specifically, in the Texas 11 – Cherokee RSA, the overlap area comprises of 5 out of 8 counties; there are at least 4 competitors in Angelina, Nacogdoches and San Augustine Counties, and 3 competitors in Sabine and Shelby Counties. Compare *CenturyTel* Petition for Waiver in WT Docket No. 02-325 (Oct. 4, 2002) at 2 (noting that multiple carriers serve “portions” of the county and “all or part of” the overlap area).

²⁶⁵ See *2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22707-08 (eliminating the rule in MSAs where 86% of counties had four or more facilities based providers (meaning 14% had less than four)).

²⁶⁶ *Rural NPRM*, 18 F.C.C.R. at 20847.

The level of competition in the relevant market (and indeed, even in the smaller overlap areas) demonstrates that the cellular duopoly conditions that prompted the rule's adoption no longer exist in these areas.²⁶⁷ Competition from PCS and wide-area SMR is now widespread, leading the FCC to recognize that "there is effective competition in the CMRS marketplace as a whole, including rural areas"²⁶⁸ and "CMRS providers are competing effectively in rural areas."²⁶⁹ This competition ensures that neither cellular nor other CMRS carriers have a lock on market share, as consumers can readily take their business elsewhere if a particular carrier were to raise prices above market levels or diminish quality.²⁷⁰ Indeed, high churn rates demonstrate that customers will readily switch providers if they are dissatisfied, a trend that will only increase with the advent of WLNP.²⁷¹

These conditions demonstrate that the RSA rule is no longer warranted²⁷² and, at a minimum, strict adherence to the rule here cannot be justified. As is the case in the nationwide market, Cingular cannot leverage its overlapping cellular interests to sustain discriminatory pricing in the BTAs or even the overlap areas. As Professor Gilbert notes:

[I]n each of the 11 RSAs where Cingular and AWS have overlapping licenses, the monthly plan prices and allotted anytime minutes for the wireless carriers show no variation between RSAs. All are priced the same as at the most common package for the top 100 CMAs for each carrier, with the exceptions of US Cellular, which offers the 500 minute regional plans for the *lower* \$35 price and Verizon Wireless offering 600 minutes for \$39.99 [*i.e.*, the same price as Verizon charges in every top 100 CMA except for San Juan, Puerto Rico]. The variation of the 11 RSAs from the top 100 CMAs is no greater than the variation found within the top 100 CMAs, and all the monthly plan prices and allotted anytime minute combinations found [in the 11 RSAs] can be found in the top 100 CMAs.²⁷³

Thus, like in *CenturyTel*, "there is little price differentiation between providers" and "mobile telephony rates are set over a much broader area."²⁷⁴ Accordingly, because the market is competitive with multiple providers offering services at similar prices, the transaction does not

²⁶⁷ See 2000 Biennial Regulatory Review, 16 F.C.C.R. at 22671, 22707-08.

²⁶⁸ Rural NRPM, 18 F.C.C.R. at 20807.

²⁶⁹ Eighth Annual CMRS Competition Report, 18 F.C.C.R. at 14838; *accord id.* at 14791.

²⁷⁰ *Id.* at 14889.

²⁷¹ McGaw Declaration at 3; Sievert Declaration at 2.

²⁷² See Comments of AT&T Wireless, Cingular, CTIA, and Dobson in WT Docket No. 02-381 (filed Dec. 29, 2003); Reply Comments of Western Wireless, WT Docket No. 02-381 (filed Jan. 26, 2004); Reply Comments of Arctic Slope Tel. Assoc. Coop., WT Docket No. 02-381 (filed Jan. 26, 2004).

²⁷³ Gilbert Declaration at 38 (emphasis added).

²⁷⁴ *CenturyTel*, 18 F.C.C.R. at 1265.

involve a significant likelihood of substantial competitive harm. The rule therefore should be waived.

Specific analyses of competitive conditions in the BTA(s) in which each of the overlaps occurs follow, as listed by overlap area:

- **CMA357 (Connecticut 1 – Litchfield)**

Southwestern Bell Mobile Systems, LLC, a Cingular subsidiary, is the licensee of RSA station KNKN589 in the Connecticut 1 – Litchfield RSA. Litchfield Acquisition Corporation, an AWS affiliate, is the licensee of RSA station KNKN833 in the Connecticut 1 – Litchfield RSA. The CGSAs of these two licenses overlap in Litchfield County, CT.²⁷⁵

Litchfield County falls within the New Haven-Waterbury-Meriden, CT BTA – the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with 5 authorized competitors other than Cingular. Using POPs to measure the size of the overlap area relative to the size of the overall BTA, Litchfield County contains 182,193 POPs, which equates to barely more than 18% of the 1,006,201 POPs BTA-wide. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁷⁶ Even in Litchfield County itself – an area too small to evaluate the merits of the waiver – there are 5 other licensed competitors. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA360 (Florida 1 – Collier)**

Florida Cellular Service, LLC, a Cingular subsidiary, is the licensee of RSA station KNKQ360 in the Florida 1 – Collier RSA. AT&T Wireless Services of Florida, Inc., an AWS affiliate, is the licensee of RSA station KNKN555 in the Florida 1 – Collier RSA. The CGSAs of these two licenses overlap in the northeast corner of Hendry County, FL.

Hendry County falls within the Fort Meyers, FL BTA – the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 6 authorized competitors other than Cingular. Using POPs to measure the size of the overlap area relative to the size of the overall BTA, Hendry County contains 36,210 POPs, which equates to less than 6% of the 629,301 POPs BTA-wide. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁷⁷ Even in Hendry County itself – an area too small to evaluate the merits of the waiver – there are 6 other licensed competitors. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

²⁷⁵ The specific CMRS spectrum holdings the combined company will be attributed with in any given county are set forth in Attachment 8.

²⁷⁶ See Gilbert Declaration at 37-38 & Table A-3.

²⁷⁷ See *id.*

- **CMA361 (Florida 2 – Glades)**

Florida Cellular Service, LLC and Florida RSA No. 2B (Indian River) Limited Partnership, both Cingular subsidiaries, are the licensees of RSA stations KNKQ361 and KNKN990, respectively, in the Florida 2 – Glades RSA. AT&T Wireless Services of Florida, Inc., an AWS affiliate, is the licensee of RSA stations KNKQ386 and KNKQ421 in the Florida 2 – Glades RSA. The CGSAs of these licenses overlap in Glades, Indian River and Okeechobee Counties, FL.

Glades County falls within the Fort Meyers, FL BTA; Indian River County falls within the Fort Pierce-Vero Beach-Stuart, FL BTA; and Okeechobee County falls within the West Palm Beach-Boca Raton, FL BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs, Glades, Indian River and Okeechobee Counties contain 159,433 POPs, which equates to slightly more than 7% of the combined 2,228,768 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁷⁸ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 5-6 other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA363 (Florida 4 – Citrus)**

Orlando SMSA Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN994 in the Florida 4 – Citrus RSA. AT&T Wireless Services of Florida, Inc., an AWS affiliate, is the licensee of RSA station KNKN738 in the Florida 4 – Citrus RSA. The CGSAs of these two licenses overlap in Lake County, FL.

Lake County falls within the Orlando, FL BTA – the smallest relevant area to evaluate the merits of the waiver. As Attachment 9 reflects, this BTA is fully competitive, with more than 6 authorized competitors other than Cingular. Using POPs to measure the size of the overlap area relative to the size of the overall BTA, Lake County contains 210,528 POPs, which equates to barely 12% of the 1,697,906 POPs BTA-wide. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁷⁹ Even in Lake County itself – an area too small to evaluate the merits of the waiver – there are 5 other licensed competitors. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA364 (Florida 5 – Putnam)**

Jacksonville MSA Limited Partnership and Orlando SMSA Limited Partnership, both Cingular subsidiaries, are the licensees of RSA stations KNKQ335 and KNKQ274, respectively, in the Florida 5 – Putnam RSA. AT&T Wireless PCS, LLC and AT&T Wireless Services of

²⁷⁸ See *id.*

²⁷⁹ See *id.*

Florida, Inc., both AWS affiliates, are the licensees of RSA stations KNKN550 and KNKQ422 in the Florida 5 – Putnam RSA. The CGSAs of these licenses overlap in Flagler and Putnam Counties, FL.

Flagler County falls within the Daytona Beach, FL BTA and Putnam County falls within the Jacksonville, FL BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the relevant BTAs, Flagler and Putnam Counties contain 120,255 POPs, which equates to less than 7% of the combined 1,852,000 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸⁰ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are 6 or more other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA598 (Oklahoma 3 – Grant)**

Oklahoma RSA 3 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN821 in the Oklahoma 3 - Grant RSA. OK-3 Cellular, Inc., an AWS affiliate, is the licensee of RSA station KNKN627 in the Oklahoma 3 - Grant RSA. The CGSAs of these two licenses overlap in Kay, Lincoln, Logan, Noble, Pawnee and Payne Counties, OK.

Kay County falls within the Ponca City, OK BTA; Lincoln and Logan Counties fall within the Oklahoma City, OK BTA; Noble and Payne Counties fall within the Stillwater, OK BTA; and Pawnee County falls within the Tulsa, OK BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 4 and in many cases more than 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Kay, Lincoln, Logan, Noble, Pawnee and Payne Counties contain 210,297 POPs, which equates to slightly more than 8% of the combined 2,512,436 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸¹ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 4-5 other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA657 (Texas 6 – Jack)**

Texas RSA 6 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN369 in the Texas 6 – Jack RSA. McCaw Communications of Gainesville, TX, LLC, an AWS affiliate, is the licensee of RSA station KNKN472 in the Texas 6 – Jack RSA. The CGSAs of these licenses overlap in Cooke, Jack, Montague and Palo Pinto Counties, TX.

²⁸⁰ See *id.*

²⁸¹ See *id.*

Cooke and Palo Pinto Counties fall within the Dallas-Fort Worth, TX BTA, and Jack and Montague Counties fall within the Wichita Falls, TX BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with more than 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Cooke, Jack, Montague and Palo Pinto Counties contain 91,269 POPs, which equates to less than 2% of the combined 5,794,290 POPs across both of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸² Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 4 other licensed competitors. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA662 (Texas 11 – Cherokee)**

Cingular Wireless of Texas RSA #11 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN538 in the Texas 11 – Cherokee RSA. Northeast Texas Cellular Telephone Company, an AWS affiliate, is the licensee of RSA station KNKN428 in the Texas 11 – Cherokee RSA. The CGSAs of these licenses overlap in Angelina, Nacogdoches, San Augustine, Sabine and Shelby Counties, TX.

Sabine County, TX falls within the Beaumont-Port Arthur, TX BTA; Angelina, Nacogdoches and San Augustine Counties fall within the Lufkin-Nacogdoches, TX BTA; and Shelby County, TX falls within the Shreveport, LA BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 5 and in some cases more than 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Angelina, Nacogdoches, San Augustine, Sabine and Shelby Counties contain 183,972 POPs, which equates to less than 15% of the combined 1,234,854 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸³ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are 5 other licensed competitors in Nacogdoches County, 4 in Angelina and San Augustine Counties, and 3 in Sabine and Shelby Counties. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA669 (Texas 18 - Edwards)**

Texas RSA 18 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN696 in the Texas 18 – Edwards RSA. Texas Cellular Telephone Company, L.P., an AWS affiliate, is the licensee of RSA station KNKN456 in the Texas 18 – Edwards RSA. The CGSAs of these licenses overlap in Bandera, Dimmit, Edwards, Frio, Kinney, La Salle, Maverick, Medina, Real, Uvalde, Val Verde and Zavala Counties, TX.

²⁸² See *id.*

²⁸³ See *id.*

Dimmit, Kinney, Maverick, Val Verde and Zavala Counties fall within the Eagle Pass-Del Rio, TX BTA; La Salle County falls within the Laredo, TX BTA; Edwards County falls within the San Angelo, TX BTA; and Bandera, Frio, Medina, Uvalde and Real Counties fall within the San Antonio, TX BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 4 and in many cases more than 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Bandera, Dimmit, Edwards, Frio, Kinney, La Salle, Maverick, Medina, Real, Uvalde, Val Verde and Zavala Counties contain 227,582 POPs, which equates to less than 10% of the combined 2,352,015 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸⁴ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 4-5 other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA670 (Texas 19 – Atascosa)**

Texas RSA 19 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN576 in the Texas 19 – Atascosa RSA. Texas Cellular Telephone Company, L.P., an AWS affiliate, is the licensee of RSA station KNKN525 in the Texas 19 – Atascosa RSA. The CGSAs of these licenses overlap in Atascosa, Brooks, Duval, Jim Hogg, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Starr, Willacy and Zapata Counties, TX.

Willacy County falls within the Brownsville-Harlingen, TX BTA; Brooks, Duval, Jim Wells, Kenedy, Kleberg and Live Oaks Counties fall within the Corpus Christi, TX BTA; Jim Hogg and Zapata Counties fall within the Laredo, TX BTA; Starr County falls within the McAllen, TX BTA; and Atascosa and McMullen Counties fall within the San Antonio, TX BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 5 and in some cases more than 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Atascosa, Brooks, Duval, Jim Hogg, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Starr, Willacy and Zapata Counties contain 235,315 POPs, which equates to less than 7% of the combined 3,599,296 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸⁵ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 4-5 other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

²⁸⁴ See *id.*

²⁸⁵ See *id.*

- **CMA671 (Texas 20 – Wilson)**

Texas RSA 20B1 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN945 in the Texas 20 – Wilson RSA. Texas Cellular Telephone Company, L.P., an AWS affiliate, is the licensee of RSA station KNKN452 in the Texas 20 – Wilson RSA. The CGSAs of these licenses overlap in Aransas, Bee, Karnes, Refugio, and Wilson Counties, TX.

Aransas, Bee and Refugio Counties fall within the Corpus Christi, TX BTA, and Karnes and Wilson Counties fall within the San Antonio, TX BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Aransas, Bee, Karnes, Refugio, and Wilson Counties contain 110,538 POPs, which equates to less than 5% of the combined 2,404,481 POPs across both of the relevant BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸⁶ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 4-6 other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

2. Waiver Will Serve the Public Interest

There are several public interest reasons why it is important for the merged company to be able to continue to operate on both cellular blocks in the eleven RSA overlap areas, and therefore why waiver would better serve the public interest than strict adherence to the rule. Most importantly, the merged company can achieve significant trunking efficiency gains in rural areas where more spectrum must be dedicated to maintaining less efficient legacy networks than in urban areas.²⁸⁷ As the Hogg/Austin Declaration explains, trunking channels together leads to increases in capacity, improvements in service and less blocked calls. By combining the 850 MHz systems of the two carriers, trunking efficiencies can result in *millions* fewer blocked calls in the RSAs where overlaps occur each year.²⁸⁸

The net positive result is twofold. First, there will be better service for legacy customers of the two companies. Second, the more efficient spectrum use will free up spectrum to use for UMTS directly or to gradually shift legacy TDMA subscribers off of the 1.9 GHz bands to free up spectrum in those bands for UMTS.²⁸⁹ Strict invocation of the rule to require divestiture of one of the 850 MHz channel blocks to a third party, however, would eliminate these efficiency gains. Maintaining separate systems (one held by Cingular and one divested to a third party)

²⁸⁶ See *id.*

²⁸⁷ Hogg/Austin Declaration at 18, 22. The need to support these legacy subscribers is especially pronounced in rural areas, where analog subscribership is higher due to use of longer range 3-watt phones, and TDMA subscribership is higher because rural systems were converted to digital later than urban systems. See *id.* at 8 n.8.

²⁸⁸ *Id.* at 18; see also *id.* at 22-24.

²⁸⁹ Mr. Hogg and Dr. Austin explain that while cell splitting can add capacity, it cannot generally free up sufficient spectrum for UMTS, and, in any event, adding cells involves numerous challenges. See *id.* at 21 n.25, 23 n.28.